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Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

CELESTINE PIERRE

Petitioner

versus

CONNECTICUT GENERAL LIFE INSURANCE COMPANY

and

LIFE INSURANCE COMPANY OF NORTH AMERICA

Respondent

On Petition for Writ of Certiorari
to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. For ERISA insurance claims in general, and unfunded policies in particular, are determinations of fact subject to de novo review by the courts?

II. In trials of ERISA claims, are the Federal Rules of Evidence applicable, and, if not, is hearsay evidence admissible without substantial guarantees of trustworthiness?

LIST OF PARTIES

In accordance with Rule 21(B) the following is a list of all parties in the court whose judgment is sought to be reviewed:

Relator:

Celestine Pierre

Attorney:

Paul Brian Spurlock

Respondents:

Connecticut General Life Insurance Company/
Life Insurance Company of North America

Attorneys:

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For the Fifth Circuit

PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

Petitioner, Celestine Pierre, prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Fifth Circuit entered on June 18, 1991.

CITATIONS TO OPINIONS BELOW

The appeals to the United States Court of Appeals for the Fifth Circuit are found in the appendix hereto and reported at 866 F.2d 141 (5th Cir. 1989) and 932 F.2d 1552 (5th Cir. 1991). The rulings of the United States District Court for the Eastern District of Louisiana are unpublished but found in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 18, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. 1132 - Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan;

29 U.S.C. 1133 - Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall-

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a [full and fair review by the appropriate named fiduciary of the decision denying the claim.]

Federal Rules of Evidence, Rules 803(24)/804 (b)(5).

804 (b)Hearsay exceptions.--The following are not excluded by the hearsay rule if

the declarant is unavailable as a witness:

803(24)/804(b)(5)

Other exceptions.--A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the

adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

There now exists a division between the circuits over the standard of review of ERISA[1] trials. Specifically, when a plan administrator denies a claim, is his factual determination subject to de novo review or the deferential "arbitrary and capricious" standard? In 1989, Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989), (hereinafter Bruch) articulated the Supreme Court's rationale in requiring de novo review of plan interpretations where specific authority is lacking. Since then, at least four circuits (The Fourth, Sixth, Seventh, and Eighth) have applied de novo review to factual determinations.

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[1]. Employee Retirement Income Security Act of 1974, 29 U.S.C. Sects. 1001-1461.

The Fifth Circuit Court of Appeals reasons otherwise and has held, in the instant case, that the arbitrary and capricious standard of review is appropriate, even without specific discretionary authority in the plan.

There is no dispute that petitioner prevails in a de novo review. The trial court judge reversed his previous judgment when he changed the standard of review.

But the Supreme Court need not address the question of de novo review if it holds, as Petitioner urges, that the Federal Rules of Evidence are applicable to ERISA trials or, alternatively, that hearsay cannot be admitted to such trials without substantial guarantees of trustworthiness.

The case involves a claim to recover death benefits to Plaintiff, CELESTINE PIERRE, arising out of an accident

insurance policy and double indemnity benefits of a life insurance policy, which her deceased husband obtained through his employer, Martin Marietta. J a m e s Pierre, a 52 year old employee at Martin Marietta, made his wife beneficiary of $307,000 of insurance should he die by accident.

Nevertheless, on the early morning of October 26, 1986, he was with his paramour, Antoinette "Cissy" Collins, who carried a gun in her purse. This night, witnesses state that Mr. Pierre was playing cards in Jim's Corner bar as Miss Collins waited. She waited until about 4:00 a.m., when Mr. Pierre withdrew from the game and gathered her up and went to Junior's Bar for a while. Finally, witnesses agree, he left to take her home.

Near home, some altercation apparently began. Within a block of Miss

Collins' home, she shot him twice, the first shot apparently causing him to drive over a stop sign. She shot him a second time, and he subsequently died.

Miss Collins fled.

When the police arrived, they found Mr. Pierre, his door still open from his attempt to escape, his body lying in the street alongside the vehicle.

The coroner subsequently reported that Mr. Pierre had died of two gunshot wounds. The first entered his right chest above the nipple, passing upward, leftward, and backward, as would result from a shot from a passenger sitting next to and facing the driver.

The second bullet entered Mr. Pierre's abdomen <u>below the navel</u> and traveled <u>upward</u> as if this shot was fired as Mr. Pierre lay outstretched falling onto the ground.

The police, after some investigation, determined Miss Collins to be the "prime suspect" in the case and began asking around her neighborhood for her whereabouts.

Subsequently, Miss Collins surrendered and gave a statement. She said that Mr. Pierre had pistol whipped her and, fearing for her life, she had pulled her gun and fired two shots, straight on, into Mr. Pierre.

Despite such inconsistencies as the path of the second bullet, her failure to call medical aid, and direct contradictions in her testimony, the police, apparently believing they could not refute her story beyond a reasonable doubt, were constrained to release her.

Mrs. Pierre filed a claim with defendant for accidental death and double indemnity benefits, which are payable as

an "accident" under Louisiana law if Mr. Pierre died of gunshot wounds, but not if he was killed in self defense. Defendant denied the claim, explaining that they believed Miss Collins' testimony and offering the widow the opportunity to submit additional evidence. She had none and accordingly filed suit for the benefits.

Mrs. Pierre, not in possession of the policy and hence unaware of its ERISA aspects, originally brought suit in Civil District Court for the Parish of Orleans, State of Louisiana.

Defendant, CONNECTICUT LIFE INSURANCE COMPANY/LIFE INSURANCE COMPANY OF NORTH AMERICA (Connecticut General), subsequently removed the suit to U.S. District Court under Sec. 1132 (e)(1) of (ERISA). Plaintiff thus is proceeding under ERISA Sec. 1132 (a)(1)(B).

Miss Collins, in response to interrogatories and at deposition, declined to make any statement whatever regarding Mr. Pierre or any circumstances relating to the claim and, through her attorney, indicated she would not testify at trial.

On June 6, 1966, the matter was submitted to the trial court on memoranda, documents and stipulated facts. Petitioner agreed that, under Louisiana law, the benefits are not payable if Connecticut can carry the burden of proving that Miss Collins acted in self defense, but contested the accuracy and admissibility of Miss Collins' hearsay statement(s).

The trial court found that the "non-hearsay evidence, by itself, would not have been sufficient to support Mr. Weidele's decision to deny Plaintiff's

claim," but held that the rules of evidence are not binding in ERISA claims and admitted the hearsay statements. The trial court entered judgment for Defendant, dismissing Plaintiff's complaint with prejudice and for costs. Plaintiff appealed the district court's decision, and the Court of Appeals for the Fifth Circuit affirmed the decision of the district court.

Plaintiff subsequently sought rehearing and rehearing en banc, both of which were denied. On the second application for rehearing the Court of Appeals vacated its previous decision and remanded the case to the district court for reconsideration in light of the decision of the United States Supreme Court in Bruch.

On November 18, 1989, the district court entered judgment in favor of

Celestine Pierre and against Connecticut General Life Insurance Company and Life Insurance Company of North America for reasons assigned in its Opinion and Order issued on October 30, 1989.

Defendant perfected an appeal to the United States Court of Appeals for the Fifth Circuit, and the District Court's decision was reversed and the case remanded for entry of judgment in favor of Defendant on June 18, 1991.

ARGUMENT

I. For ERISA insurance claims in general, and unfunded policies in particular, are determinations of fact subject to de novo review by the courts?

Until Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989), (hereinafter Bruch) the courts had been given scant direction regarding ERISA claims. Certainly the Act itself provided no guidance from Congress.

Accordingly, a body of jurisprudence developed analogizing ERISA claims procedures to such administrative claims procedures as those applied to the Labor Management Relations Act (LMRA). Notably, the arbitrary and capricious standard of review was adopted by virtually every jurisdiction.

In Bruch, the Supreme Court provided

direction.

Presumably sensing this direction from the Supreme Court, the majority of past-Bruch cases have, as Connecticut General admits, made no distinction between claims involving plan interpretations and others brought under Sect. 1132(a)(1)(B). Most such cases, in one way or another, at least tangentially involve some plan interpretation. For example, the instant case turns on interpretation of the word "accident" and application of the facts attendant to the accident in question.

But the Bruch rule has been applied to a number of cases not apparently involving plan interpretation. In so doing, the courts have not commented on the absence of plan interpretations but have merely cited the "rule of Bruch:"

At least the Fourth, Sixth, Seventh

and Eighth Circuits have held that a de novo review is appropriate when considering determinations of fact.[2] Other jurisdictions have ordered de novo review based on other matters not involving plan interpretations.[3] The cited cases are by no means an exhaustive survey of post-Bruch cases. But they demonstrate the general acceptance of the application of the rule of Bruch whether

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[2] Boyd v. Tr. of United Mine Workers Health & Ret. F., 873 F.2d 57 (4th Cir. 1989) (whether a mine accident was responsible for an emotional impairment); Kelley v. American Tel. & Tel. Co., 715 F. Supp. 1036 (D.Kan. 1989); Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327 (8th Cir. 1989). See also Burnham v. Guardian Life Ins. Co. if America, 873 F.2d 486 (1st Cir. 1989).

[3] Miller v. Eichleay Engineers, Inc., 886 F.2d 30 (3rd Cir. 1989); Sandifer v. Central States Southeast and Southwest Areas Pension Fund, 709 F. Supp. 713 (E.D. La 1989); Slover v. Boral Henderson Clay Products, Inc., 714 F. Supp. 825 (E.D. Tex. 1989); Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir. 1989); Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37 (11th Cir. 1989)

or not the case turns on plan interpretation.

To be sure, the Supreme Court in Bruch noted at the outset that it addressed actions challenging denials of benefits based on plan interpretations and, at p.953[4], "express(ed) no view as to the appropriate standard of review for actions under other remedial provisions of ERISA." At p. 954[5] and thereafter, however, the Court seemed to expand the decision to matters involving eligibility for benefits irrespective of whether a plan interpretation is involved.

Probably the most frequently relied upon justification for de novo review of factual determinations is the references in Bruch to the lack of specific discretionary authority in the plan to

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[4]. 109 S.Ct. 948, 953.

[5]. Bruch, 109 S.Ct. 948, 954.

determine eligibility for benefits.

At p.954, the Supreme Court said:

> Firestone can seek no shelter in these principles of trust law, however, for there is no evidence that under Firestone's termination pay plan the administrator has the power to construe uncertain terms or that eligibility determinations are to be given deference.

At p.956, the Supreme Court said:

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under Sect. 1132 (a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Of course, as the Fifth Circuit argues, the Supreme Court was discussing plan term interpretations. But if, as the Fifth Circuit suggests, specified discretionary authority to determine

benefit eligibility is not required, why would the drafter of the plan ever include such authority? Would it not be simpler and more direct to specifically authorize plan term interpretation? Clearly, the only reason to specify discretionary authority for benefit eligibility determinations would be to provide discretionary authority for benefit eligibility determinations.

The Seventh Circuit, in Petrilli v.Drechsel, No. 88-6051, slip op. at 6-8, 1989 WL 106639 (N.D.Ill. Sept.11, 1989), rev'd on other grounds, 910 F.2d 1441, 1446 (7th Cir. 1990) said:

> [The] rationale supporting the Court's adoption of de novo review provides no basis for discrimination between denials based on plan interpretations and denials for other reasons. By analogy to trust law, the rationale focuses on whether the written terms of the plan confer discretion on the administrator, and not on the type of decision-factual or

> interpretive-that the administrator is rendering.

For example, the Supreme Court in Bruch, at p. 955, said:

> The trust law de novo standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer's denial of benefits before enactment of ERISA were governed by principles of contract law.

Certainly, the same can be said with respect to findings of fact prior to the enactment of ERISA.

The Supreme Court also said:[6]

> ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," (citing authority) and to protect contractually defined benefits". (citing authority) Adopting Firestone's reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was

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[6]. Ibid.

enacted.

This latter concept is particularly telling in the instant case. The trial court, under the arbitrary and capricious standard of review, afforded no protection to petitioner. Only under de novo review did he provide the protection petitioner would have enjoyed prior to the enactment of ERISA. Interestingly, the Fifth Circuit, at p. 1558, finds that "[T]he federal courts' application of a deferential standard of review to factual determinations after the passage of ERISA does not result in the loss of any substantial rights...," and considers this finding a support for deferential review of findings of fact.

The Pierre Court "decline(d) to accept such an application of Bruch,"[7] resulting in a split of authority between

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[7]. Pierre, p.1559.

the circuits. The Fifth Circuit did not address the Eighth Circuit's position, but, addressing the Sixth Circuit's decisions, it held that "the Sixth Circuit thus far has only reflexively applied Bruch to all Sect. 1132(a)(1)(B) claims without addressing the distinction between term and fact issues."

Addressing the Fourth and particularly the Seventh Circuits' reasoning that the Supreme Court's trust law analogy requires de novo review of factual determinations, the Pierre[8] Court noted that the Bruch analysis included a comparison between plan term interpretations and contract interpretations. Analogizing between a plan administrator and a lower court and maintaining that contract interpretations

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[8]. Pierre v. Conn. Gen. Life Ins. Co.,932 F.2d 1552 (5th Cir. 1991).

of a court are reviewed de novo, whereas findings of fact are not, the Pierre Court reasoned that "the Supreme Court leaves the impression that it was not addressing the standard of review applicable to determinations made by the finder of fact."[9]

Similarly, at p. 1558, the Fifth Circuit analogizes between findings of fact made by a federal judge and those of the plan administrator.

Relator urges that to analogize a plan administrator to a judge is to beg the question. As the Supreme Court said in Bruch at p.955, "[O]ne is a fiduciary to the extent he exercises any discretionary authority or control." That is, if the plan administrator is defined as a judge, his decisions should be accorded the deference of a judge's decisions. But, in

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[9]. Pierre, p.1561.

fact, the paragraph of Bruch discussing contract law specifically refers to the administrator as a "party", not a judge, saying:

> As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation.[10]

Particularly when the plan is unfunded, as in the instant case, deferring to the decision of an insurance claims adjustor/ plan administrator as one would to the decision of an impartial trier of fact is to appoint the wolf henhouse guardian.

The appropriate analogy would be to attempt to show that, in trust law, a trustee's findings of fact are subject to an arbitrary and capricious standard of review. In fact, such deference is accorded a trustee, "when discretion is

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[10]. Bruch, p.955.

conferred upon the trustee"[11] (emphasis supplied). Restatement (Second) of Trusts Section 187 (1959) says:

> When discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

At Note h., Illustration 6., it continues:

> So also will the court interpose where the trustee fails to use his judgment because of a mistaken view as to the extent of his powers or duties, whether the mistake is one of law or fact.

Thus, if discretion is conferred upon a trustee, an exercise of that discretion will be granted deference.

In the instant case, since no such discretion was granted, the Fifth Circuit inferred it, saying:

> It is indisputable that an ERISA trustee, by its very

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[11]. Restatement (Second) of Trusts Section 187 (1959).

> nature, is granted some inherent discretion.... The question is whether this grant can reasonably be construed to be authority to make factual determinations on the claims before it. We know, of course, that the Supreme Court in Bruch held that this inherent discretion did not extend to a decision that interpreted plan terms. Nevertheless, it seems clear to us that decisions made in the performance of functions that are "necessary or appropriate" to the daily and routine administration of plans are inherently discretionary. Restatement (Second) Trust Section 186, read in conjunction with the ERISA principles contained in 29 U.S.C. 1102(a)(1), leads us to conclude that this "necessary or appropriate" discretion includes passing on issues of fact that determine individual eligibility for benefits.[12]

But it could equally be said that interpretation of plan terms is "necessary or appropriate" to the daily and routine administration of plans, for how could one administer a plan whose terms he had not

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[12]. Pierre, p. 1558.

interpreted? As the Supreme Court has already explained, this does not mean that plan interpretations are discretionary with the trustee or that such interpretations are accorded deference.

Nevertheless, the Fifth Circuit noted that inherently necessary to the daily decisions made by the administrator are the determination of facts and the application of those facts to the terms of the plan as they interpret them, saying, at p. 1557.

> Fully acknowledging the Supreme Court's conclusion with respect to plan term interpretations, we nonetheless must recognize that before benefits are paid or denied, a plan administrator has to make determinations that may be divided into two general categories. First, he must determine the facts underlying the claim for benefits (citing authority). Second, he must then determine whether those facts constitute a claim to be honored under the terms of the plan (citing authority). Bruch addressed the proper standard of review that is to be given

> to the plan administrator's second determination. Bruch did not speak to the first.

Yet, the Fifth Circuit reads Restatement (Second) Trust, Sect. 186 and ERISA as support for the application of Bruch only to the second category without explanation for the distinction. Surely, some interpretation of the plan is "necessary and appropriate" to every decision.

Clearly, the Fifth Circuit construes this implication of discretion liberally. Fortunately, neither the law of trusts nor, apparently, the Supreme Court is in accord.

According to 2A W. Fratcher, Scott on Trusts, Sect. 164, p. 250 (4th ed. 1987):

> The extent of the duties and powers of a trustee depends primarily on the terms of the trust.
>
> . . . one who reads the cases involving modern trusts cannot fail to notice the reluctance

with which many courts are willing to hold that the trustee has powers that are not expressed in the trust instrument.[13]. . . The settlor cannot safely rely on a hope that without such express provisions the court will find that powers necessary or appropriate for the efficient administration of the trust are to be inferred. . . . Where the power is not conferred expressly or by implication, it is possible to apply to the court that has authority to confer the power, but such an application involves expense and delay and will not ordinarily be granted unless the exigencies of the situation clearly require it.

Similarly, "The Development of the Powers of Trustees" 47 Harv. L. Rev. 510, 517 (1934), states:

> At common law, authority other than necessary to fulfill the trust has been regarded as withheld unless expressly granted. Under existing statutes, the jurisdiction of equity has been increased, but the powers of trustees not substantially enlarged.

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[13]. Ibid, p. 251.

And, according to Fratcher, Trustees' Powers Legislation, 37 N.Y.U.L. Rev. 627 (1962):

> In the absence of legislation a trustee has no power virtute officii; his only powers are those expressly or impliedly granted to him by the terms of the instrument creating the trust. The rule and its corollaries, which tend toward narrow construction of powers expressly granted and judicial reluctance to find implied powers, stem from precedents laid down long ago at times when economic conditions, social organization, word meanings and trust purposes were far from what they now are. The law of trusts is part of the law of property in which stare decisis had special honor (emphasis supplied).

Moreover, in determining whether such authority can be inferred, trust law looks to the intent of the settlor. In the instant case, Connecticut General is the trustee, Mrs. Pierre is the beneficiary, and Mr. Pierre, who earned the policy as compensation for employment and chose the

beneficiary, is the settlor.

2A W. Fratcher, Scott on Trusts, Sect. 164, p. 253 (4th ed. 1987) explains:

> Since the extent of the duties and of the powers of a trustee depends primarily on the terms of the trust, it is important to consider what is meant by "the terms of the trust." The phrase, as here used, means the manifestation of the intention of the settlor with respect to the trust, expressed in a manner that admits of its proof in judicial proceedings, whether expressed by written or spoken words or by other conduct (emphasis supplied).

And, at p. 255:

> Among the circumstances existing at the time of the execution of the instrument that may be of importance in determining the terms of the trust are the following: the situation of the settlor, the beneficiaries, and the trustee, such as age, sex, competence, station in life, financial circumstances, and their relations to each other; the nature and value of the subject matter of the trust; the purposes for which the trust is created; the usages of business; the conditions under which the trust is to be

> administered; the formality or informality, the care or lack of care, with which any instrument containing the manifestation of the settlor's intention is apparently drawn. Thus, where a trust is created for successive beneficiaries and there is no express provision in the trust instrument as to what shall be treated as income and what is principal, the fact that the beneficiary entitled to the remainder is not so related is frequently of importance as showing that the testator presumably intended that certain receipts should be treated as income rather than as a principal (emphasis supplied).

And, at p.260:

> The general principles governing the interpretation of a trust instrument are the same as those that govern the interpretation of instruments under which property is disposed of absolutely, whether by instrument inter vivos or by will. In many cases the court is ascertaining not what the settlor actually intended in regard to a particular matter but what he would have intended if he had thought about the matter. Professor Gray has pointed out that when judges say they are interpreting the

> intention of a testator, what they are often doing is deciding what shall be done in contingencies he did not contemplate, rather than ascertaining what he actually intended; they are determining what he probably would have intended with respect to a matter as to which he not only did not express but did not have any intention (emphasis supplied).

"The Development of the Powers of Trustees" 47 Harv. L. Rev. 510, 517 (1934) says:

> The interpretation of wills has been characterized as a "guess at what the testators would have intended if they had thought of the point in question, which they did not." Since legal rules of trust administration apply only when the testator (or inter vivos settlor) has failed to express any intention, it is a reasonable surmise that they were the products of just such "interpretation".

Is there really any question as to whether Mr. Pierre would have intended to provide the insurance company with power

to determine whether to pay his widow and to deny her effective judicial review?

Accordingly, if the intention of the settlor is paramount, it is substantial support for the proposition that deference can not be inferred in ERISA claims.

This is consistent with the decision in Bruch at p.954, where the Supreme Court said:

> Hence, over a century ago we remarked that "[w]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act." Nichols v. Eaton, 91 U.S. 716, 724-725, 23 L.Ed. 254 (1875) (emphasis added).

The Fifth Circuit, noting that the Supreme Court analogizes ERISA to contract law, advanced several arguments for the proposition that, were contract law applied, a deferential review of fact determinations would be appropriate.

Petitioner is constrained to note that non-ERISA life and accident insurance policies are governed by contract law. Under contract law the decision of the insurance company would be given no deference under any circumstances, for there would be no trustee.

The Fifth Circuit ostensibly takes no position in the question of whether a de novo review of factual determinations requires a de novo trial, calling it a "fundamental ambiguity left unanswered in Bruch."[14] In fact, however, it presumes that the trial court cannot receive testimony. At p. 1559, it says:

> Moreover, de novo review of factual determinations is a difficult and uncertain exercise on a cold record. It seems to us that no persuasive argument can be made that de novo review of an issue of fact is more reliable than a

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[14]. Pierre, p. 1561, n.13.

> standard of review that respects the advantage of the fact finder while also protecting against abuse of the fact finder's power.

Even were review of an administrative record the correct interpretation of Bruch, the argument has no meaning in cases like the instant case, wherein the claims adjustor merely reviewed the "cold record" provided by his investigator. No option to adduce live testimony was afforded petitioner, nor was she able to cross-examine witnesses. Were the administrator to provide a genuine hearing with testimony, an impartial arbiter and procedural safeguards, as, for example in Social Security hearings, and were no de novo trial appropriate, perhaps the argument would be more persuasive.

Finally, the Fifth Circuit argues that de novo review of fact determinations will result in increased litigation. If

Bruch has resulted in increased litigation, it has not been noted. Presumably, Bruch will result in more equitable handling of claims, with diminished necessary for suit. Moreover, the Supreme Court has already addressed that contention in Bruch at p.956, saying:

> Neither general principles of trust law nor a concern for impartial decisionmaking, however, forecloses parties from agreeing upon a narrower standard of review. Moreover, as to both funded and unfunded plans, the threat of increased litigation is not sufficient to outweigh the reasons for a de novo standard that we have already explained.

Conflict of Interests

The Bruch decision found it unnecessary to consider the problem of conflict of interests facing the administrator of an unfunded plan. There appears to be no reason to do so herein.

But the dilemma presented says much about the nature of the trust under

consideration. The very reason that discretionary acts of a trustee are given deference is the presumption of impartiality.

When an insurance company pays out fewer benefits, the stockholders and, accordingly, all who work for the company benefit to the detriment of the plan beneficiaries.

Any claims adjustor, by any title, is still an advocate for retention of assets for the company. Considering him an impartial trustee seems a form of sophistry. The trial court has found that, were this not an ERISA case, the benefits would be paid to the widow. To reverse that decision on the presumption that Mr. Pierre or his representative anticipated or would have acquiesced in denominating the insurance company as impartial arbiter in the payment of claims

is surely legal fiction.

Worse, it debases the ERISA insurance policy in comparison with equivalent policies. With over $300,000 in benefits, Mr. Pierre obviously sought protection for his wife. The purpose of ERISA was to provide that protection. With a non-ERISA policy, she would be protected. ERISA should neither deny nor impair that protection.

II. In trials of ERISA claims, are the Federal Rules of Evidence applicable, and, if not, is hearsay admissible without substantial guarantees of trustworthiness?

The question of exclusion of hearsay in ERISA trials has already been considered by the Court in Daniel v. Eaton Corp., 839 F.2d 263 (6th Cir. 1988). This case, which was pre-Bruch, adhered to the theory that the trial court must consider only the evidence presented to the trustee. Nevertheless, the Sixth Circuit considered the admissibility of hearsay evidence placed into the record by the trustee. The standard of admissibility it employed was the Federal Rules of Evidence. It asked, as any court in any type of proceeding must, whether "there were sufficient indicia of trustworthiness to make the (evidence) admissible."

The applicability of the Federal Rules of Evidence apparently has not been questioned in ERISA trials until the instant case, so no further precedent can be cited.

The requirement of guarantees of trustworthiness is not limited to the Federal Rules of Evidence, of course. It is a basic tenet of the law of evidence.

E. Morgan, Basic Problems of Evidence, (1962), at p.253 summarizes Professor Wigmore's treatise on the matter by saying:

> Wigmore, by classifying former testimony and admissions as non-hearsay, has purported to find in every recognized exception some necessity for using the hearsay and something in its content or in the circumstances of its utterance which serves as a guaranty of its trustworthiness.

Tompkins, The Chamberlayne Trial Evidence, 2nd ed. (1938), Sect. 714, p.678, explains further:

> However, and in general, it may be said that the hearsay rule is rigid, and courts relax the rule only where the fixed rules upon which the admission of such declarations depend are met.

E. Conrad, 1 Modern Trial Evidence, (1956), Sect. 271, p.230 adds:

> Exceptions to the hearsay rule must be carefully guarded in their application.

In the case at bar, the trial court's original decision noted:

> The court finds that this non-hearsay evidence, by itself, would not have been sufficient to support Mr. Weidele's decision to deny Plaintiff's claim.

Hence, exclusion of the hearsay evidence obviates the need for other considerations.

But the trial court originally admitted the hearsay, noting:

> [I]n an administrative agency decision which, like a plan administrator's claim determination, is subject to judicial review under the

> arbitrary and capricious standard, the individuals making the administrative determination generally are not restricted by the rules of evidence. [15]

Of course, the claims adjustor, unless he provides a hearing on reconsideration, may wish to rely entirely on hearsay. But he does so at risk of reversal of his decision. At trial, any hearsay must meet the criteria of the hearsay exceptions.

The authority cited by the court, moreover, in fact demarcates the limits of admissibility in administrative claims, as is discussed infra, and provides criteria for determining guarantees of trustworthiness.

The Fifth Circuit Court of Appeals, on original review, analogized ERISA trials to the Administrative Procedure Act

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[15]. Original Trial Court Decision, October 31, 1989.

(APA) and the Social Security Act (SSA), noting that these acts, unlike ERISA, specifically provide for the use of hearsay. But the decision utterly failed to address the guarantees of trustworthiness required under those administrative procedures, addressing instead the question of substance or probative weight.

The trial court's second decision, though reversing his prior finding, apparently admitted the testimony on the same rationale as his first. Still, guarantees of trustworthiness were not considered.

The Fifth Circuit, on second hearing, reported:

> On rehearing, the district court applied de novo review and excluded the hearsay evidence....[W]e conclude that an abuse of discretion standard of review is appropriate in this case. Applying that standard, we reverse the

decision of the district court.[16]

The Fifth Circuit made no further reference to admissibility. Thus the inescapable conclusion is that the Fifth Circuit rules that the admissibility of evidence is determined by the standard of review. Lacking any explanation for such a conclusion, petitioner is left to believe that the analogy between the APA and SSA on one hand and ERISA on the other has been expanded to include the rules of hearsay evidence. Had the rules been correctly incorporated, the hearsay in this case would still have been excluded.

For under any standard of review, hearsay requires guarantees of trustworthiness, particularly when there is no opportunity for cross-examination.

The Federal Rules of Evidence address

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[16]. Pierre, p.1553.

these guarantees in Rules 804 (b)(3) and 803(24)/804 (b)(5). In cases where the statute specifically provides for the use of hearsay, as in the Social Security Act and the Administrative Procedures Act, these guarantees of trustworthiness are addressed in a line of jurisprudence.

This does not conflict with the practical requirements of the claims adjustor/trustee. Unlike SSA and APA proceedings, ERISA trustees have chosen to eschew more formal hearings and have settled for the informal investigations of claims adjustors and investigators. No provisions are made for live testimony, objection to the introduction of evidence, cross-examination of witnesses, impartial arbiters, or any of the safeguards inherent in our system of justice. This is their prerogative. But the decision of the trustee must stand up to the rigors of

a trial. When there is no dispute as to testimony, parties ordinarily will, and do, stipulate that the testimony adduced by hearsay would be repeated at trial. If, however, the hearsay is flawed or cannot be reproduced, fairness dictates that it be excluded.

Comparison with the Social Security Act and Administrative Procedures Act is instructive.

The pertinent difference between the Administrative Procedures Act (hereinafter APA) and the Social Security Act (hereinafter SSA) on one hand and ERISA on the other is that APA and SSA specifically provide for the admissibility of hearsay.[17] (But even under those liberal criteria, the Collins statement(s) would be inadmissible).

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[17]. Richardson v. Perales, 402 U.S. 389, 410, 28 L.Ed.2d 842, 91 S.Ct 1420 (1971).

No such provision is found in ERISA, and there is no basis for the extension of these provisions to ERISA.

But even were this matter subject to the hearsay rules of the Social Security Act or the Administrative Procedure Act, the general rule is that articulated by the Supreme Court in Consolidated Edison Co. v. NLRB, 1938, 305 U.S. 197, 230, 59 S.Ct. 206, 83 L.Ed. 126, and known as the "residuum rule."

The Supreme Court said:

> The statute provides that "the rules of evidence prevailing in courts of law or equity shall not be controlling." The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in

> evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence. (emphasis supplied)

The Court in School Board of Broward Cty., Fla. v. H.E.W., etc., 525 F.2d 900 (5th Cir. 1976) says that the "residuum rule":

> ...requires a reviewing court to set aside an administrative finding unless the finding is supported by some evidence which would be admissable in a jury trial. Under this rule, the legal character of the evidence as hearsay is determinative; no consideration is given to the reliability of the evidence or the circumstantial setting in which it arises. (emphasis supplied)

This rule was explained in Richardson v. Perales, 402 U.S. 389, 28 L.Ed.2d 842, 91 S.Ct. 1420 (1971) to propose some tests for identifying admissible hearsay. The Court in School Board of Broward (supra), analyzing Richardson, said:

> The Court proceeded to analyze certain factors which gave the hearsay probative force:
> (1) the out-of-court declarant had no bias (or interest in the outcome;)
> (2) the reports were available prior to the hearing, and the claimant could have subpoenaed the out-of-court declarant;
> (3) there was no inconsistency on the face of the reports;
> (4) written medical reports by treating physicians have an inherent reliability and probative worth long recognized by the courts (emphasis supplied).

(It should be noted that none of the above criteria were met by the hearsay testimony of Miss Collins.)

Thus SSA claims, which specifically allow for the use of hearsay in their statutes and which provide formal hearings with procedural safeguards, still require indicia of trustworthiness for the admissibility of hearsay.

Should ERISA beneficiaries be the first to be denied this basic protection? Should insurers be allowed to decide what

evidence shall eventually decide the case without these fundamental restrictions? To sanction it would be to place a claimant at a disadvantage merely because the claim arose under ERISA.

In Bruch, at p.955, the Supreme Court said:

> ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," (citing authority). Adopting Firestone's reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted. (emphasis supplied).

The Fifth Circuit, in Lowery v. Bankers Life and Cas. Retirement Plan,[18] specifically noted these instructions from the Supreme Court, saying:

> Bruch instructs us that Congress did not intend to

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[18]. 871 F.2d 522, 524 (5th Cir. 1989).

> constrict the common law rights of employees when it enacted 29 U.S.C. 1132(a)(1)(B) as part of ERISA. The Bruch Court made clear that the wholesale importation of an arbitrary and capricious standard of review in 1132(a)(1)(B) actions erroneously "afford(ed) less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted."---U.S. at _____, 109 S.Ct. at 956.

Similarly, in Maryonovich v. Market Data Retrieval, Inc., 716 F.Supp. 343 (N.D.Ill. 1989), the court said:

> Ironically then, the enactment of ERISA--a statute clearly intended to provide protection for employees' rights to pensions and benefits--led at first under the pre-Firestone deferential standard to a body of case law which made it easier for management to avoid payment even though state courts would have enforced the employees' rights to those benefits under the same policies.

The investigator who interviewed Miss Collins apparently only asked such questions as would elicit answers

consistent with justification of the murder. He did not ask how the bullet traveled upward in Mr. Pierre's body, or why his gun was found where he had been sitting, or why he never fired a shot in response, or how he could have grabbed her dress, held his gun and driven at the same time, all as she testified. He never asked why, in her confession to the police she stated first that she did not, then that she did, live with Mr. Pierre.

Mrs. Pierre is entitled to address these questions if Miss Collins' explanation is to be accepted into evidence.

Relator urges that to admit untrustworthy hearsay in the instant case would be to provide Plaintiff less protection than she would enjoy under <u>any</u> judicial procedure, for the Trial Court has repeatedly held that there is no

trustworthiness in Miss Collins' statements. ERISA beneficiaries deserve better protection than that afforded by the Fifth Circuit in this case.

RESPECTFULLY SUBMITTED:

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APPENDIX

Celestine PIERRE and the Estate of James Nolan Pierre, Jr., Plaintiffs-Appellees,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY/LIFE INSURANCE COMPANY OF NORTH AMERICA, Defendant-Appellant.

No. 89-3861.

United States Court of Appeals,

Fifth Circuit.

June 18, 1991.

Worker's widow brought suit contesting denial of benefits under accidental death policies provided pursuant to Employee Retirement Income Security Act (ERISA) plan following death of worker shot by his lover. The United States District Court for the Eastern District of Louisiana, at New Orleans, A.J. McNamara, J., after originally entering judgment for insurer, on remand entered judgment for widow, and insurer appealed. The Court

of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) for factual determinations made under ERISA plans in claim denials, abuse of discretion standard of review, rather than de novo review, is appropriate, and (2) insurer's denial of accidental death benefits under worker's ERISA plan based on factual determination that worker's shooting death at hands of his lover was not "accidental" within meaning of policies was not abuse of discretion.

Reversed and remanded.

Opinion, 866 F.2d 141, vacated.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARZA, JOLLY and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case is before us for a second

time. It requires us to determine the appropriate standard for review of factual determinations made by plan administrators under ERISA. The plaintiff brought suit for the denial of accidental death benefits under her husband's ERISA plan. In the first round, the district court applied the then proper standard of arbitrary and capricious review to the decisions of the ERISA plan administrator. Accordingly, it allowed the administrator to consider "hearsay" evidence, and concluded that the administrator's denial of the plaintiffs' claim was not arbitrary or capricious. On appeal, this court affirmed. 866 F.2d 141 (1989). Shortly thereafter, the Supreme Court decided Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d

80 (1989), mandating de novo review for certain decisions by ERISA plan administrators. We vacated our previous opinion and remanded the case for further proceedings in the light of Bruch. 877 F.2d 345. On rehearing, the district court applied de novo review and excluded the hearsay evidence. It then proceeded to reject the plan administrator's decision, and entered judgment for the plaintiff. The defendant appeals. As we explain in further detail below, we hold that Bruch does not require de novo review for factual determinations such as those in this case. Rather, we conclude that an abuse of discretion standard of review is appropriate in this case. Applying that standard, we reverse the decision of the district court.

I.

The relevant facts are straightforward. The defendant, Connecticut General Life Insurance Company/Life Insurance Company of North America (hereinafter "Connecticut General") issued to Martin Marietta Corporation two insurance policies to fund claims under its employee welfare benefit plan. The plaintiff-appellee's husband, James Pierre, was employed by Martin Marietta and participated in its employee insurance benefit plan. He was shot to death during the early morning of October 26, 1986.

The admitted killer was Antoinette ColIins, the deceased's lover. After investigation by the New Orleans police department, it was determined that Pierre was last with Ms.

Collins the morning he was killed and that she was the principal suspect. She soon turned herself in and made a statement claiming that she had in fact shot Pierre to death, that there were no witnesses, and that her actions had been in self- defense. The New Orleans police credited her story and declined to prosecute. On November 10, 1986, Pierre's wife filed a claim for $290,000 in benefits under one of the group accident insurance policies and a claim for $17,000 under the accidental injury benefit provision of the other policy. Along with these accidental death claims, she submitted a copy of the death certificate in which the death was classified as a "homicide."

Connecticut General investigated the claims. Detective Fanguy of the New Orleans police

department related to Connecticut General that Ms. Collins had confessed to the police that she had shot the deceased following an altercation in his car during which he had pistol whipped her with one of his guns; that the interior of the deceased's car showed signs of a struggle; and that Ms. Collins appeared to have been beaten when she turned herself in to the police. Connecticut General also hired a private investigator to investigate the claims, and he uncovered additional facts. The private investigator viewed the police records and photographs of Ms. Collins at the police department, and confirmed that the police department photographs revealed visible bruises and lacerations on Ms. Collins and that one eye appeared badly injured.

The investigator also

conducted a persona] interview with Ms. Collins who acknowledged that she had been dating the deceased and stated that he had beaten her previously. She also stated that the deceased knew that she carried a gun. She further stated that they had argued at a bar on the night of his death and that he had beaten her with one of his two guns during a second dispute on the way home, stopping his car as they argued. It was during the second altercation that Ms. Collins claimed she took a pistol from her purse and shot the deceased twice while he was struggling with her.

On the basis of the information supplied by Detective Fanguy, the death certificate, and the private investigator's report, Mr. Weidele, the ERISA plan administrator, concluded that the deceased's death was

not "accidental" within the terms of the policies; that is, because the deceased was the aggressor and his actions precipitated the shooting that resulted in his death, his death did not result "directly and from no other causes, from bodily injuries caused by accident." After reaching this conclusion, Connecticut General asked the plaintiff to submit any new or contrary information she might have for their reconsideration, and, receiving none, Connecticut General denied the claim.

II.

The plaintiffs filed this action in state court to recover accidental death benefits under the two group insurance contracts. Connecticut General removed the action to United

States District Court on the basis of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sect. 1132(e). The matter was submitted to the judge on stipulated facts at the initial hearing of this case. The parties agreed that under Louisiana law, benefits were not payable if Ms. Collins acted in self-defense. The plaintiffs, however, contested the accuracy and admissibility of Ms. Collins's hearsay statement. The district court applied the arbitrary and capricious standard of review to the plan administrator's denial of benefits, determined that the hearsay evidence relied upon by the plan administrator was properly considered in assessing the claim for benefits, and concluded that the decision of the administrator was "neither arbitrary or capricious." Specifically, the court found that the

"non-hearsay evidence, by itself, would not have been sufficient to support the [plan administrator's] decision to deny plaintiffs' claim," but held that the rules of evidence are not binding in ERISA claims and allowed the statement. The district court entered judgment for the defendant, and we affirmed, holding that the denial of benefits was based on substantial evidence, and therefore, was not arbitrary and capricious. On petition for rehearing, we vacated our opinion and remanded the case to the district court for determination whether the Supreme Court's recent decision in Firestone Tire & Rubber Co. v. Bruch applied.

On remand, the district judge used a two-step analysis in concluding that the administrator's denial of the plaintiffs' claims was unwarranted.

First, the district court held that because neither party had identified any provision in the ERISA plan expressly giving the plan administrator discretionary authority, de novo review was appropriate. Second, in applying de novo review, the court disallowed the hearsay evidence as lacking in trustworthiness, and concluded that it was insufficient to support the plan administrator's decision to deny the plaintiffs' claim. As a result, the district court reversed its earlier ruling and entered judgment for the plaintiffs. The defendant appeals.

III

A

The insurance policies in

this action are governed by ERISA, 29 U.S.C. 1001 et seq. Connecticut General, the plan administrator[19] of Martin Marietta's employee welfare plan, is a fiduciary for purposes of ERISA because it exercises authority or control in the distribution of assets of the benefits plan. 29 U.S.C. Sect. 1002(21)(A). ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and ... in accordance with the documents and instruments governing the plan." 29 U.S.C. Sect. 1104(a)(1)(D).

ERISA does not set out the appropriate standard of review for evaluating benefit determinations of

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[19]. ERISA defines a plan administrator as an entity with discretion in the administration of the plan. 29 U.S.C. Sect. 1002(21)(A) (1982).

plan administrators, fiduciaries or trustees in actions challenging those determinations under Sect. 1132(a)(1)(B).[20] Federal courts, however, increasingly adopted the arbitrary and capricious standard developed under Sect. 186(c) of the Labor Management Relations Act ("LMRA"), 61 Stat. 157, 29 U.S.C. Sect. 186(c). The result, with few exceptions, was that the arbitrary and capricious standard became the standard of review in every federal jurisdiction that considered the denial of ERISA plan benefits, irrespective of the nature of

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[20]. Sect. 1132(a)(1)(B) provides "A Civil action may be brought-(I) by a participant or beneficiary-(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

the benefits claimed.[21] The justification for adopting this standard was that it prevented abdication of judicial control over fiduciaries while avoiding excessive judicial intervention in the operation of benefit plans. See Bayles v. Central States, Southeast & Southwest Areas Pension Fund, 602 F.2d 97, 100 (5th Cir.1979) and Wolfe v. J.C. Penney Co., 710 F.2d 388 (7th Cir.1983). This justification notwithstanding, the

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[21]. See e.g., Jestings v. New England Telephone & Telegraph Co., 757 F.2d 8, 10-11 (1st Cir. 1985); Morse v. stanley, 732 F.2d 1139, 1145 (2d Cir.1984); Shiffler v. Equitable Life Assur. Soc., 838 F.2d 78 (3d Cir.1988); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir.1985); Le Febre v. Westinghouse Electric Corp., 747 F.2d 197 (4th Cir. 1984); Denton v. First Nat. Bank, 765 F.2d 1295, 1303-04 (5th Cir.1985); Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees, 740 F.2d 454 (6th Cir.1984), cert. denied, 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985); Pokratz v. Jones Dairy Farm, 771 F.2d 206 (7th Cir.1985).

across-the-board use of this standard was not without some criticism. See, e.g., Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1049-53 (7th Cir.1987).

B

(1)

In Firestone Tire & Rubber Co. v. Bruch, supra, the Supreme Court for the first time addressed the issue of the appropriate standard of review for claim denials under ERISA. Writing for the Court, Justice O'Connor criticized the resulting wholesale importation of the arbitrary and capricious standard into ERISA because in certain cases it had left employees worse off than they

were before ERISA.[22] The Court unanimously rejected the analogy to the LMRA that had served as the basis for applying the arbitrary and capricious standard to plan term interpretations. 109 S.Ct. at 953-55. Instead, trust principles should guide the choice of standards of review for plan administrator actions. Id. at 954 (citing Restatement (Second) of Trusts Sect. 187 (1959)). It then noted that a trustee's decisions are accorded deferential treatment only where the

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[22]. Specifically, the Court found that pre-ERISA courts reviewed the acts of plan administrators under the non-deferential de novo standard in those cases where the terms of the instrument did not provide for the permissive exercise of a plan administrator's power. 109 S.Ct. at 954. The Court acknowledged, however, that pre-Bruch courts gave deference to decisions of plan administrators when the terms of the instrument provided for discretionary authority. Id. See, eg., Smith v. New England Tele. & Tel. Co., 109 N.H. 172, 246 A.2d 697, 698 (1968).

instrument itself grants the trustee discretion. Therefore, the Court reasoned, deference to an ERISA benefit plan administrator's decision is appropriate only where the benefit plan grants discretion to the administrator to interpret plan terms. 109 S.Ct. at 953-56. The Court concluded that de novo review of ERISA plans is appropriate only when the plan does not give the plan administrator discretionary authority to interpret plan terms. Id. at 956.

(2)

The outcome in our case today turns upon the proper application of the Supreme Court's holding in Bruch; specifically, we must determine whether Bruch encompasses a holding that de novo

review is required of factual determinations by ERISA fiduciaries. In this analysis, a point of tension is created by Bruch's express limitation, on the one hand, that, "The discussion that follows is limited to the appropriate standard of review in Sect. 1132(a)(B)(1) actions challenging denials of benefits based on plan term interpretations," 109 S.Ct. at 953 (emphasis added); and, on the other hand, the absence of the express limitation in the latter part of the opinion:

> [T]he validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue. Consistent

> with established principles of trust law, we hold that a denial of benefits challenged under Section 1132(a)(1)(b) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. (Emphasis added)

109 S.Ct. at 956.

The district court in the instant case correctly determined that the plan instrument contained no express provision giving the plan administrator discretionary authority to construe plan terms when determining the eligibility of the claimant. Finding no such provision, the district court, without addressing the distinction between factual determinations and plan term interpretations, held that Bruch required de novo review.

Connecticut General argues that the district court improperly interpreted the Supreme Court's holding in Bruch. Although conceding that Bruch applied de novo review for "plan term interpretations," Connecticut General argues that the instant case does not involve a denial of benefits based on an

interpretation of a plan term. On the contrary, the instant case involves a plan administrator's factual determinations that, Connecticut General argues, are not controlled by the Bruch holding. Connecticut General concludes that de novo review is an ill-advised standard to apply to an ERISA plan administrator's purely factual determinations, and that a more deferential standard of review is better suited for such determinations.

(3)

This is a case of first impression in this circuit.[23] In fact,

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[23]. In Lowry v. Bankers Life and Cas. Retirement Plan, 871 F.2d 522, 525 n. 5 (5th Cir. 1989), we noted that we did not have occasion to consider whether Bruch allows a reviewing court to resolve questions of fact. Subsequently, in Schultz v. Metropolitan Life Ins. Co., 872 F.2d 676, 678 (5th Cir.1989), we stated:

> Neither party has pointed to any provision in the Plan

> which gives the administrator discretionary authority to determine benefit eligibility or to construe the plan terms. Accordingly, the district court's review of the administrator's denial of the Schultz claim will be tested here based on a de novo review standard.

The Schultz court, however, expressly describe the issue before it as "one of contract interpretation." Id. at 679. Therefore, unlike the parties in this case, the parties in Schultz do not appear to have contested the factual determinations made by the plan administrator. Consequently, we do not consider Schultz a determination of the issue before us. Finally, our recent opinion in Cathey v. Dow Chemical Co. Med Care Program, 907 F.2d 554 (5th Cir.1990), should not be read as applying de novo review to a plan administrator's decision to deny benefits. The question in Cathey was unrelated to the issue we decide today. The question there was not whether a claim under the plan was improperly denied; instead, the issue was whether the plan granted the administrator discretionary authority in making claim determinations. In deciding this question, the appellate court reviewed fact findings

we have found only one other circuit court that has expressly decided this issue,[24] and the district courts that have considered it are split. Compare, e.g., Guisti v. General Electric Co, 733 F.Supp. 141, 147-48 (N.D.N.Y.1990) (applying de novo), and with Moshin v. John Hancock Mutual Life Ins. Co., No. 88- 60415, slip op. at 5-6 (E.D.Mich. Nov. 27, 1989) (applying arbitrary and capricious); Petrilli v. Drechsel, No.

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of the district court, which related only to the discretionary authority placed in the administrator by the plan. Therefore, the Cathey court did not address the proper standard of review for factual determinations made pursuant to a claim determination by a plan administrator.

[24]. See Reinking v. Philadelphia American Life Ins. Co., 910 F.2d 1210 (4tb Cir.1990), and discussion infra. See accord De Nobel v. Vitro Corp., 885 F.2d 1180 (4th Cir.1989). The Seventh Circuit in Petrilli v. Drechsel, 910 F.2d 1441 (7th Cir.1990), did consider this issue in dicta. See discussion infra.

88-6051, Slip op. at 6-8, 1989 WL 106639 (N.D.Ill. Sept. 11, 1989) (same), rev'd on other grounds, 910 F.2d 1441 (7tb Cir.1990); and Questech, Inc. v. Hartford Acci. & Indem. Co., 713 F.Supp. 956, 962-63 (E.D.Va.1989) (same).

We begin our analysis by reviewing the role of a fiduciary or plan administrator under ERISA. ERISA defines a fiduciary as one who "exercises any discretionary authority or discretionary control respecting management of [a] plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. Sect.1002(21)(A)(i). A fiduciary has "authority to control and manage the operation and administration of the plan," 29 U.S.C. Sect. 1102(a)(1), and must provide a "full and fair review" of claim denials.

29 U.S.C. Sect. 1133(2). In Bruch, Firestone pointed to these ERISA provisions and argued that "an ERISA plan administrator, fiduciary, or trustee is empowered to exercise all his authority in a discretionary manner subject only to review for arbitrariness and capriciousness." Id. at 955 (emphasis in original). The Court, however, rejected Firestone's contention that these sections made plan term interpretations inherently discretionary, noting that these ERISA provisions do not "characterize a fiduciary as one who exercises entirely discretionary authority or control." Id. (emphasis in original). Rather, the Court, referring to common law trust principles, noted that "only to the extent that he exercises any authority and control" is a plan administrator a

fiduciary. Id. (emphasis in original).

Fully acknowledging the Supreme Court's conclusion with respect to plan term interpretations, we nonetheless must recognize that before benefits are paid or denied, a plan administrator has to make determinations that may be divided into two general categories. First, he must determine the facts underlying the claim for benefits. See Makar v. Health Care Corp., 872 F.2d 80, 83 (4th Cir.1989) (plan fiduciaries are responsible for assembling a factual record which will assist a court in reviewing the fiduciaries' actions). Second, he must then determine whether those facts constitute a claim to be honored under the terms of the plan. See generally Dennard v. Richards Group, Inc., 681 F.2d 306 (5th Cir.1982). Bruch addressed the proper standard of review

that is to be given to the plan administrator's second determination. Bruch did not speak to the first.

We think that it is completely consistent with the principles of trust law to apply a different standard of review to each of these categories of decisions. The Supreme Court did not eschew "deferential review" part and parcel. Indeed, as the Court expressly acknowledged, "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." 109 S.Ct. at 954. The Restatement (II) Trusts Sect. 187 (1959), provides: "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of this discretion." The

Restatement (II) Trust Sect.186(b), provides further that:

> [T]he trustee can properly exercise such powers and only such powers as ... (b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust.

It is indisputable that an ERISA trustee, by its very nature, is granted some inherent discretion, i.e., "authority to control and manage the operation and administration of the plan." 29 U.S.C. Sect.1102(a)(1); furthermore, he is required to provide

"a full and fair review" of each claim denial. The question is whether this grant can reasonably be construed to be authority to make factual determinations on the claims before it. We know, of course, that the Supreme Court in Bruch held that this inherent discretion did not extend to a decision that interpreted plan terms. Nevertheless, it seems clear to us that decisions made in the performance of functions that are "necessary or appropriate" to the daily and routine administration of plans are inherently discretionary. Restatement (Second) Trust Sect.186, read in conjunction with the ERISA principles contained in 29 U.S.C. Sect.1102(a)(1), leads us to conclude that this "necessary or appropriate" discretion includes passing on issues of fact that determine individual eligibility for

benefits.[25] See Makar, 872 F.2d at 83.

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[25]. The comments to 186 support our position:

> In addition to the powers conferred in specific words by the terms of the trust, the trustee has such powers as are necessary or appropriate to carry out the purposes of the trust and are not forbidden either in specific words or otherwise by the terms of the trust. It is to be inferred that the settlor intended to confer upon the trustee such powers as under the circumstances known to or anticipated by the settlor are necessary or appropriate to carry out the purposes of the trust. * * * The trustee can properly exercise such powers as it appears from the language used in the trust instrument were intended to be conferred upon him, although not conferred in specific words. * * * The existence of powers in the trustee may be gathered not merely from the language in the trust instrument but from the nature of the purposes of the trust.

Consequently, under the principles of trust law, we owe the administrator's factual determination a deferential review. See generally Du Pont v. Southern Nat. Bank, 771 F.2d 874 (5th Cir.1985).[26]

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[26]. Congressional intent supports our conclusion. Courts justify a discretionary standard by correctly asserting that ERISA requires plan administrators to process claims. Makar, 872 F.2d at 83. See also Denton v. First Nat. Bank, 765 F.2d 1295, 1304 (5th Cir.1985) (Congress intended to give administrators primary responsibility for processing claims); Daniel v. Eaton Corp., 839 F.2d 263 (6th Cir.1988) (plan administrator has broad discretion in deciding questions of coverage and eligibility for benefits); Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1304 n. 3 (9th Cir.1983) (efficient plan administration). We acknowledge that the Supreme Court in Bruch rejected these justifications for plan term interpretations. We believe,

There are additional considerations that militate against applying Bruch's de novo review to factual determinations. Unlike plan term interpretations, factual determinations do not involve contract interpretations. Factual determinations are generally reviewed under some discretionary standard such as clearly erroneous discretion, arbitrary and capricious, or abuse of discretion. Anderson v. Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); Pullman-Standard, Div. of Pullman, Inc. v. Swint, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). Thus, the federal courts' application of a deferential standard of review to

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however, that in the area of reviewing factual determinations, these justifications for a deferential standard of review remain valid and compelling.

factual determinations after the passage of ERISA does not result in the loss of any substantial rights comparable to the loss that the Supreme Court noted in applying the arbitrary and capricious standard to term interpretations, which "constrict[ed] the common law rights of employees." Bruch, supra. Therefore, this important justification for the Bruch Court's rejection of a deferential standard of review for plan term interpretations is absent in the consideration of factual determinations.

Moreover, de novo review of factual determinations is a difficult and uncertain exercise on a cold record. It seems to us that no persuasive argument can be made that de novo review of an issue of fact is more reliable than a standard of review that respects the advantage of the fact finder while

also protecting against abuse of the fact finder's power. In virtually all decisional review, some deference is given to the fact finder, whether it is a district court giving deference to an administrative body, or an appellate court giving deference to the district court. See, eg., Anderson v. Bessemer City, supra. We see no reason here why the plan administrator, i.e., the trier of fact, should be placed in a different status. See Daniel v. Eaton Corp., 839 F.2d 263, 267 (6th Cir. 1988) (pre-Bruch) ("A federal court is to focus on the evidence before the trustees at the time of their final decision and is not to hold a de novo factual hearing on the question of the applicant's eligibility.") (quoting Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d

820, 824 (7th Cir.1980)).

There is a compelling practical reason why plan administrators are given wide discretionary powers in making factual determinations. We only need consider, for example, the number of claims that must be approved or denied under these plans. The plan administrator must determine if someone qualified for a benefit by length of service, the remaining unused benefits, the nature of the injury, where the injury occurred, whether a particular injury was accidental or whether it was during the course and scope of employment, and on and on. The courts simply cannot supplant plan administrators, through de novo review, as resolvers of mundane and routine fact disputes. See Anderson v. Bessemer City, 470 U.S. at 574-75, 105 S.Ct. at 1512

("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources"). Considerations of expediency therefore support deference to factual determinations made in the administration of the plan. Otherwise, federal trials are encouraged in the vast numbers of claims that are filed in the thousands of ERISA plans throughout this country.

Thus, we think that plan administrators justifiably fear that de novo review of their discretionary decisions will increase litigation. See Flint, ERISA: The Arbitrary and Capricious Rule Under Siege, 39 Cath.U.L.Rev. 133 (1989). The expenses of such litigation will often reduce the

size of the fund from which benefits are paid. We therefore conclude that a deferential standard for factual determinations is buttressed, if not compelled, by practical considerations.

(4)

Nevertheless, the plaintiff cites numerous post-Bruch cases which purportedly apply de novo review to factual determinations without specifically addressing the merits of de novo versus a more deferential standard of review.[11] After careful study of

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[11]. See, e.g., Miller v. Eichleay Engineers, Inc., 886 F.2d 30 (3d Cir.1989); Boyd v. Trustees of United Mine Workers Health & Retirement Funds, 873 F.2d 57 (4th Cir.1989); Sandifer v. Central States Southeast and Southwest Areas Pension Fund, 709 F.Supp. 713 (E.D.La. 1989); Slover v. Boral Henderson Clay Products, Inc., 714 F.Supp. 825 (E.D.Tex.1989); Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir.1989); Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327 (8th Cir.1989); and Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37 (11th Cir.1989).

those cases, we decline to accept such an application of Bruch. Plaintiffs further argue that we should follow the lead of the Sixth Circuit, citing two recent opinions from the Sixth Circuit that have purportedly applied de novo review to factual determinations. In McMahan v. New England Mut. Life Ins. Co., 888 F.2d 426., 431 (6th Cir.1989), the court remanded to the district court to determine de novo whether the term "employee" in the ERISA plan applied to the deceased. Not only is this question arguably a plan term interpretation, but both parties agreed that de novo review was appropriate; therefore, the issue before us was not before that court. In Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 551 (6th Cir.1989), the court did in fact remand the case for

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determination, under the de novo standard, of an apparent factual issue. The Brown court, however, as the McMahan court, failed to address the distinction between factual determinations and plan term interpretations. We conclude, therefore, that the Sixth Circuit thus far has only reflexively applied Bruch to all 1132(a)(1)(B) claims without addressing the distinction between term and fact issues. Because the Sixth Circuit has not directly addressed the issue before us today, we view these cases as unpersuasive, if not inapposite, authority.

The Seventh Circuit, however, has come closer to addressing this issue, albeit in dicta. In Petrilli v. Drechsel, No. 88-6051, slip op. at 6-8, 1989 WL 106639 (N.D.Ill. Sept. 11, 1989), rev'd an other grounds, 910 F.2d

1441 (7th Cir.1990), the district court adopted the narrower interpretation of Bruch, holding that de novo review is not required in cases of factual determinations. On appeal, the Seventh Circuit reversed on other grounds. Nevertheless, the court addressed in dicta the district court's interpretation of Bruch. Although noting that the district court's interpretation was "plausible," the Seventh Circuit advanced three lines of analysis for rejecting a restrictive interpretation of Bruch.

First, the Seventh Circuit rejected the district court's reliance on the language at the beginning of the Bruch opinion that stated the scope of the issue the Court was deciding. See 109 S.Ct. at 953. The Seventh Circuit observed that a later recital by the

Supreme Court in Bruch did not contain the restrictive "plan term interpretation" language:

> [W]e hold that a denial of benefits challenged under Sect.1132(a)(1)(b) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Id. at 1446 (quoting Bruch, 109 S.Ct. at

956). The Seventh Circuit reasoned from this language that, "[t]his later recitation of the holding strongly suggests that the Court intended de novo review to be mandatory where administrators were not granted discretion, regardless of whether the denials under review were based on plan interpretations." Id. The Seventh Circuit, continuing to isolate and to rely upon this same sentence in Bruch, asserted further that

> [I]f this were not the intent, the Court could simply have omitted the words 'to determine eligibility for benefits,' from the above-quoted holding and confined the

> 'unless' clause to 'unless the benefit plan gives the administrator or fiduciary discretionary authority to construe the terms of the plan.'[28]

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[28]. The Fourth Circuit has also apparently relied on this language in its decision to apply de novo review to factual determinations. Reinking, supra. The Reinking court stated that a plan administrator's

> factual determination is not controlling because the standard announced in Firestone applies both to the interpretation of policy terms and to factual determinations necessary for the administrator to 'determine eligibility for benefits.' Courts will review both sets of questions de novo

Id. Finally, the Seventh Circuit concluded that

> [T]he rationale supporting the Court's adoption of de novo review provides no basis for discrimination between denials based on plan interpretations and denials for other reasons. By analogy

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> unless the policy delegates discretionary authority to one of the parties. In our view, nothing in the policy at issue in this case grants [the plan administrator] discretionary authority to find the facts necessary to make eligibility, determinations.

910 F.2d at 1214 (citations omitted).

> to trust law, the rationale focuses on whether the written terms of the plan confer discretion on the administrator, and not on the type of decision--factual or interpretive--that the administrator is rendering.

910 F.2d at 1446.

We find the Seventh Circuit's rationale unconvincing. Initially, we note that, the Seventh Circuit has taken the quote it relies on out of context. The entire paragraph states:

> As this case aptly demonstrates, the validity of a claim

to benefits under an ERISA plan is likely to turn on the interpretations of terms in the plan at issue. Consistent with established principles of trust law, we hold that a denial of benefits challenged under 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine

eligibility for benefits or to construe the terms of the plan.

(Emphasis ours.)

109 S.Ct. at 956. (Emphasis added.) When these two sequential sentences are read together, we think that the conclusion opposite to that reached by the Seventh Circuit is more tenable. Indeed, the specific language chosen by the Supreme Court in this prior sentence, that is, "as this case aptly demonstrates," and "the interpretations of terms in the plan at issue," when read with the earlier statement defining the scope of the issue before the court, allows but one conclusion: the Bruch holding decided only those like instances where the facts are not in dispute and recovery of benefits is dependent solely

on the fiduciary's interpretations of plan terms.[29]

Furthermore, the Seventh and Fourth Circuits' reasoning that the Supreme Court's common law trust analogy requires de novo review of factual determinations is likewise not convincing.[30] Indeed, in addressing the

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[29]. We again refer to the explicit back drop the Supreme Court chose for its opinion to make clear the limitations of its decision:

> The discussion which follows is limited to the appropriate standard of review in 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. (Emphasis ours.)

109 S.ct. at 953. Unlike the Seventh and Fourth Circuits, we cannot lightly reject as meaningless this expressly stated limitation.

[30]. The Fourth Circuit in Reinking reasoned that, "For us to grant the plan administrator such discretion would unnecessarily undermine the protection of the employee afforded by the ERISA

application of trust law, the Bruch analysis suggests an additional reason for concluding that its discussion is limited to the construction of plan terms. The Supreme Court compared plan term interpretation to contract interpretation. See 109 S.Ct. at 955. Generally, contract interpretation is reviewed under a de novo standard; a reviewing court does not defer to the lower court's interpretation of the contract as long the interpretation looks to the four-corners of the contract. Once, however, the lower court goes beyond the boundaries of the written document to make determinations of fact, its findings are subject to a deferential standard. See generally Carpenters Amended and Restated Health

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statute." 910 F.2d at 1214.

Benefit Fund v. Holleman Construction Co., 751 F.2d 763, 766-68 (5th Cir.1985). Thus, we think that in analogizing to contract interpretation, the Supreme Court leaves the impression that it was not addressing the standard of review applicable to determinations made by the finder of fact.[31]

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[31]. Indeed, Bruch does not address at all the immediate question presented by applying a de novo standard to factual determinations: whether the district courts are to conduct a de novo hearing or only a de novo review of the plan administrator's factual determinations. In other words, " is the district court to confine itself to the evidence" before the plan administrator, or should it allow a full trial on the merits, including new evidence. See Local 777 Democratic Union Org. Comm. V. Nat'l Labor Relations Bd., 603 F.2d 862, 892 (D.C.Cir.1978) (distinguishing between "a de novo trial, where 'the case is tried a second time and the record is made up in the district court, and a court's review of findings of an administrative body, where the record is solely that of the administrative body'") (citations omitted). We only note this fundamental ambiguity left unanswered in Bruch to reinforce our view that the Supreme Court's analysis emphatically was not dealing with fact issues.

Finally, the history of Bruch belies the Seventh Circuit's interpretation. The Third Circuit in Bruch explicitly reserved comment on the proper standard of review for factual determinations and, therefore, that issue was not directly before that Court. See, e.g., Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 144 n. 9 (3d Cir.1987) ("It should be noted that we also do not deal here with a determination of fact by a plan administrator. We leave for another day the definition of the context, if any, in which courts should defer to such a determination.") Thus, once Bruch reached the Supreme Court, the issue we confront today had been expressly extracted from the case.

(5)

Although not expressly addressing the appropriate standard of review for factual determinations, the Supreme Court did make two points very clear: (1) the analogy to the LMRA which gave rise to the arbitrary and capricious standard is unsound, see 109 S.Ct. at 953-54; and (2) trust principles should guide the choice of standard of review under ERISA. Id. at 954-56. The question before us is whether to apply the arbitrary and capricious standard or one that is less deferential.

In Van Boxel, supra, the Seventh Circuit criticized the arbitrary and capricious standard as being unclear and often requiring "bad faith" for reversing the trustees' denial of benefits. See, eg., Allen L,. United Mine Workers of America 1979 Benefit

Plan & Trust, 726 F.2d 352 (7th Cir.1984); Dockray v. Phelps Dodge Corp., 801 F.2d 1149 (9th Cir.1986). Moreover, the arbitrary and capricious standard has often been interpreted virtually to eliminate all Judicial review to the exercise of discretion r)y the trustee. Van Boxel, 836 F.2d at 1050. The Supreme Court seems to have rejected the arbitrary and capricious standard of review completely when it said, "Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighted as a 'factor[] in determining whether there is an abuse of discretion.'"[32] 109 S.Ct. at 956

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[32]. Since Bruch, we have applied an abuse of discretion standard to plan administrators' interpretations of plan terms where the plan expressly confers discretion on the plan administrator. See,

(citations omitted). Our thorough consideration leads us to the conclusion that the arbitrary and capricious standard for factual determinations is inapplicable because it may be interpreted and applied in a manner that is "too stringent." Van Boxel at 1051.

Rather, we look to trust law to determine the appropriate standard of review. In Du Pont v. Southern Nat. Bank, supra, we held that when the exercise of discretion is left to the trustee, federal courts review the actions of that trustee "only for an abuse of discretion." 771 F.2d at 887. The Du Pont court reasoned that

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e.g. Lowry v. Bankers Life and Cas. Retirement Plan, 865 F.2d 692, reh'g denied 871 F.2d 522, 524 (5th Cir.1989); Batchelor v. Intern. Broth. of Elec. Workers Local 861, 877 F.2d 441, 442-43 (5th Cir. 1989); Jordan v. Cameron Iron Works, Inc., 900 F.2d 53, 55-56 (5th Cir.1990).

"[w]henever discretion is conferred upon a trustee, the trustee must act within the bounds of 'a reasonable judgment,' and has a duty to deal impartially with the beneficiaries of the trust." 771 F.2d at 887 n. 12 (quoting Restatement (II) of Trusts Sect.187 comment i (1959)). See also S. Scott, The Law of Trusts Sects. 187.2, 232 (3d ed.1967) and Restatement (II) Trusts, supra, Sects.183, 232. Accordingly, we hold that for factual determinations under ERISA plans, the abuse of discretion standard of review is the appropriate standard; that is, federal courts owe due deference to an administrator's factual conclusions that reflect a reasonable and impartial judgment. We believe that an abuse of discretion standard best balances the need to respect the plan administrator's factual

determinations and the need to protect beneficiaries by providing some judicial review of those decisions.

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[2] The instant case will illustrate an application of the abuse of discretion standard. The heart of this case is the weight to be given to certain "hearsay" statements. Even in resolving this dispute, the plan administrator enjoys certain advantages that the courts do not have. He is much closer to the facts and the investigation. Acting through its agents, Connecticut General conducted the investigation and interviewed the declarant. On review, however, we can require that the hearsay meet certain indicia of reliability; if it does not,

the abuse of discretion standard permits the court to reject the finding. If, for example, the evidence had been only the murder suspect's hearsay statement that, "I shot Pierre when he tried to strike me," unsupported by corroborating evidence, then the abuse of discretion standard would permit us to conclude that, because of the witness's self-serving interests, the decision to deny benefits based on this statement, without more, would be beyond the bounds of a reasonable judgment.

Here, however, the plan administrator's decision was based on corroborating evidence. The plan administrator considered the information supplied by Detective Fanguy, the death certificate, and the private investigator's report which was based on the police records and photographs of

Ms. Collins. Moreover, the plan administrator requested that Pierre's wife submit any evidence that suggested that Pierre's death was not brought about by his own actions. Receiving no additional information from Pierre's wife, the administrator made a reasonable and impartial decision to deny the claim. In the light of the entire circumstances surrounding the denial of the claims, we conclude that the plan administrator's factual determination that Pierre's death was not "accidental" within the meaning of the policies was not an abuse of discretion.

IV

For the reasons stated above, the decision of the district court is

hereby REVERSED and the case is REMANDED for entry of judgment in favor of Connecticut General.

REVERSED and REMANDED.

MINUTE ENTRY

McNAMARA, J.

JUNE 22, 1988

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CELESTINE PIERRE, ET AL * CIVIL ACTION

VERSUS * NO. 87-5554

CONNECTICUT GENERAL LIFE * SECTION"D"(1)

INSURANCE COMPANY/LIFE

INSURANCE COMPANY OF NORTH

AMERICA

OPINION AND ORDER

This matter came on for trial on a former day and, by agreement of the parties, was submitted to the court for a decision on the merits on documents

and certain proffered testimony with the Plaintiff preserving her objection to certain documents and testimony as inadmissible because based on hearsay.

The Plaintiff, Celestine Pierre, brought this action to recover death benefits under policies of insurance which her decedent's employer purchased from the Defendants, Connecticut General Life Insurance Company and Life Insurance company of North America ("Connecticut General"), to provide benefits to employees and their dependents as part of an employee welfare benefit program. The policy provisions under which the Plaintiff brought suit permit recovery of accidental death benefits when, and only when, an insured's death results, directly and from no other causes, from bodily injuries caused by accident.

The decedent, James Pierre, died of gunshot wounds on or about October 26, 1986 when Antoinette Collins shot him twice after the decedent had allegedly beat her. Mr. Pierre's employer subsequently submitted an application for life and accident insurance proceeds on the Plaintiff's behalf. When Connecticut General learned that the decedent's death was a result of homicide, they then sought further information regarding the circumstances of James Pierre's death. On the basis of information obtained in the course of its investigation, Connecticut General denied the Plaintiff accident benefits, stating that the information obtained indicated that the decedent was the aggressor in an accident which precipitated his own death by foreseeable means. Connecticut

General invited the Plaintiff to submit her accident claims for reconsideration if she had any other information to the contrary.

Without requesting reconsideration or giving Connecticut General any information to contradict the conclusions set forth in the initial claim denial, the Plaintiff filed this suit to procure accident benefits. The parties agree that the policies at issue are governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sect. 1001-1461. Therefore, Plaintiff's exclusive remedy for denial of plan benefits arises under Sect. 502(a) of ERISA. Pilot Life Insurance Co. v. Dedeaux, 107 S.Ct. 1549 (U.S. 1987). ERISA does not entitle plaintiff to a trial de novo with respect to a denial of a claim for benefits under an ERISA

plan. Instead the statute provides for judicial review of benefit determinations using the arbitrary and capricious standard. Dennard v. Richards Group, Inc., 681 F.2d 306, 313 (5th Cir. 1982); Bayles v. Central States, Southeast and Southwest Pension Fund, 602 F.2d 97 (99-100) (5th Cir. 1979). Thus, a claim administrator's determination with respect to a claim for benefits under an employee welfare plan must be sustained as a matter of law unless the plaintiff can prove that the decision was arbitrary and capricious. In other words, in a case involving accidental death benefits, plaintiff bears the burden of proving that the defendant claim administrator acted arbitrarily and capriciously in deciding that the shooting death was not accidental.

The arbitrary and capricious standard is the least demanding form of judicial review and is the same standard which the Administrative Procedure Act prescribes for the actions of administrative agencies. Pokratz v. Jones Dairy Farm, 771 F.2d 206, 209 (7th Cir. 1985); see also, 5 U.S.C. Sect. 706. As the Fifth Circuit explained in Dennard, 681 F.2d 306, 313, the arbitrary and capricious standard derives from trust law and, consistent with the trust law underpinnings of ERISA, prevents excessive judicial intervention in the fiduciary activity of ERISA claim administrators. Thus, under ERISA the court is to focus its inquiry upon whether the denial of the claim was arbitrary or whether it was based on "substantial evidence" known to the plan fiduciary at the time of

denying the claim. Berry v. CIBA-Geigy, 761 F.2d 1003, 1007 (4th Cir. 1985). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966). Before condemning a decision as arbitrary and capricious a court "must be very confident" that the administrator overlooked something important or "seriously erred" in assessing the evidence. Pokratz, 771 F.2d 206, 209.

According to Connecticut General's statement of facts, the evidence before the plan administrator, Mr. Robert Weidele, concerning the circumstances of James Pierre's death consisted of the following:

1. The death certificate showing that

James Pierre died as a result of a homicide.

2. Photocopies of newspaper clippings reporting James Pierre's shooting death.

3. Mr. Weidele's interview with Detective Fanguy in which Fanguy reported:

A. Mr. Pierre was into drug use, had a girlfriend and a wife;

B. On the night of Mr. Pierre's death, he had a fight with his girlfriend. The girlfriend claimed that Mr. Pierre was pistol-whipping her and that she shot him in self-defense;

C. The girlfriend's photographs showed signs of beating;

D. Mrs. Pierre was well aware of the beatings and knew who had killed her husband but did not tell the police "because they would have found out anyway."

E. The case had been turned over to the District Attorney's office, who, in all likelihood, would not prosecute the girlfriend, and;

F. The interior of the car showed signs of a struggle.

4. The autopsy report showing the cause of death from gunshot wounds.

5. The Equifax Claim Services report prepared by Bill King which contained

the following information:

A. Mr. King reviewed Antoinette Collins' statement given to the police from which he concluded:

> Her statement included informatio n to the effect that they had gone out together to the Glass House Bar and had argued there, and he beat her. Then he took her home and they argued in the car, and he began beating her again and she managed to get her pistol out of her purse, which was a .22 caliber pistol, and shot him two times in the right side. They were struggling for the gun and he was hitting her with the pistol when she shot him and then fled the scene.

B. Mr. King also viewed photographs of Antoinette Collins in police files and noted that these photos "revealed that the suspectin this case had her left eye almost totally closed because of bruises and injuries, there were lacerations or abrasions to the side of her neck on the left side and also on the top of her left shoulder."

C. Mr. King also interviewed Antoinette Collins. He made the following report with respect to that interview:

> The interview with

Antoinette Collins revealed that she had initially met James Pierre about two years ago when she was working at Jim's Bar, a local establishment, as a barmaid and that she had dated him off and on for the last two years. . . . She stated that he first physically assaulted and beat her up several weeks prior to his death when they'd had a disagreement and she

was living at another location. She also stated that about one week before James Pierre's death, she had gone out to the Glass House Bar at the corner of 3rd and Saratoga Streets here in New Orleans, and he found her there and accused her of "messing around on him", and he beat her up at the bar at that time.

The evening before his death, they had gone out

for a few drinks and dancing and had argued and he was bringing her home. They argued on the way home and he stopped the 1983 Cadillac El Dorado, . . . and began beating her with his long-barrel gun. She stated that he actually carried two guns, one having about a four-or five-inch barrel on it and the other one was a Derringer. He had the long-barrel gun in his hand and

hit her upside the head with the gun and also on the shoulder and neck. She was struggling with him and then managed to get her gun out of her purse and shot him two times and ran off . . .

I asked her specifical ly how long she had owned a gun and she stated that several years ago she went to nursing school for a while and had to catch a bus at 6:00 a.m. in a tough

area, and her dad didn't want her standing out there without any protection. At that time her Dad bought her a .22 Caliber pistol that she carries, and she had carried it in her purse off and on pretty regularly since that time. She stated that James Pierre was well aware that she owned this gun and carried it with her in her purse and should have known that she wasn't

afraid to use it.

D. Mr. King also obtained the District Attorney's screening form showing that that office refused to prosecute the charges against Antoinette Collins. The refusal code indicated that the Defendant had a "good defense," meaning that the District Attorney had no ability to refute the claimed defense.

Plaintiff's only substantial objection to Mr. Weidele's disposition of the claim is that he considered hearsay evidence in arriving at his decision to deny the claim. The court notes that almost all of the evidence concerning the actual altercation between James Pierre and Antoinette Collins was derived ultimately from Collins' statements to the police and to the claims investigator which statements were subsequently relayed to Weidele. The only non-hearsay evidence concerning

the altercation consisted of Detective Fanguy's statement to Weidele that the photographs of Collins showed her to be bruised and beaten and that the interior of the car showed signs of a struggle.[33] The court finds that this non-hearsay evidence, by itself, would not have been sufficient to support Mr. Weidele's decision to deny Plaintiff's claim. The court concludes, however, notwithstanding Plaintiff's arguments to the contrary, that the plan administrator is not bound by the rules of evidence in assessing the merits of a claim for benefits. The court notes that in an administrative agency decision which, like a plan administrator's claim determination, is

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[33] Mr. King, the claims investigator, also noted that the photos of Antoinette Collins showed bruises on the left side of her face and on her left shoulder.

subject to judicial review under the arbitrary and capricious standard, the individuals making the administrative determination generally are not restricted by the rules of evidence. Richardson v. Perales, 402 U.S. 389 (1971); Williams v. United States Department of Transportation, 781 F.2d 1573, 1578 (11th Cir. 1986) (hearsay is admissible and may constitute "substantial evidence"); School Board of Broward County v. Department of Health, Education & Welfare, 525 F.2d 900 (5th Cir. 1976) (use of hearsay in administrative proceeding is proper). This is as it must be since strictly admissible forms of evidence are not always available in administrative settings and administrative decision-makers are often lay people unfamiliar with strict legal rules governing

admissibility.

In light of the evidence presented to the plan administrator, Mr. Weidele, this court cannot find that Mr. Weidele's decision was arbitrary or capricious. There was substantial evidence from which Weidele could have concluded that James Pierre was the aggressor in the altercation with Antoinette Collins, and that by his own acts he precipitated his death by foreseeable means. Therefore, the decision of the plan administrator must be affirmed. Accordingly;

IT IS ORDERED that judgment be entered in favor of Defendants and against Plaintiff dismissing Plaintiff's Complaint with prejudice.

New Orleans, Louisiana, this 22nd day of June, 1988.

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UNITED STATES DISTRICT JUDGE

Celestine PIERRE, Plaintiff-Appellant,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY/LIFE INSURANCE COMPANY OF NORTH AMERICA, Defendant-Appellee.

No. 88-3506

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

Feb. 23, 1989.

Beneficiary under accidental death policy provided as part of employee welfare benefit plan brought action contesting denial of benefits following insured's shooting death. The United States District Court for the Eastern District of Louisiana, McNamara, J., entered judgment in favor of insurer, and insured appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) insurer which provided accidental death coverage as

part of employee welfare benefit plan could, as plan fiduciary, consider hearsay evidence in determining whether to deny coverage, and (2) substantial evidence supported insurer's denial of benefits based on determination that insured's shooting death was not accidental.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, JOHNSON and JONES, Circuit Judges.

REAVLEY, Circuit Judge:

Celestine Pierre brought this action contesting the denial of insurance benefits for the shooting death of her husband, James Pierre. Mr. Pierre purchased an accidental death insurance policy from Connecticut

General Life Insurance Company and Life Insurance Company of North America (Connecticut General), which was provided as part of an employee welfare benefit plan through his employer. Connecticut General determined that Mr. Pierre's death was not an accident and refused to pay benefits to Mrs. Pierre. The district court upheld the denial of benefits and dismissed the complaint with prejudice. Because we find the denial of benefits to be based on substantial evidence and not arbitrary and capricious, we affirm.

Background

New Orleans police found the body of James Pierre in his car on October 26, 1986. He had been shot twice. Antoinette Collins, a girlfriend

of Mr. Pierre, turned herself in to police the next day. She confessed to shooting Mr. Pierre when he refused to stop beating her with his own handgun. The police, accepting Miss Collins' story, declined to prosecute her.

Celestine Pierre filed claims to recover benefits under an accident insurance policy and an accidental injury benefit provision of a separate life insurance policy. Recovery under both policies is precluded if Mr. Pierre was shot and killed in self-defense. The claims were investigated by Robert Weidele, an assistant claims manager for Connecticut General. The circumstances of the shooting were gleaned from a discussion with the detective on the case, the death certificate and autopsy report, and the written report of a private

investigator who reviewed police records and interviewed Miss Collins. On the basis of this information, Connecticut General concluded that Mr. Pierre's death was not an accident and denied Mrs. Pierre's claims for recovery of benefits.

Mrs. Pierre did not request a reconsideration hearing and initially filed her claim in state court. The employee welfare benefits plan, through which Connecticut General provides insurance, is governed by the Employee Retirement Income Security Act (ERISA). Connecticut General removed the action to federal district court. Mrs. Pierre's motion to remand the claim to state court was denied. On the basis of written trial memoranda and stipulations, the district court issued an opinion and order on the merits. The

district court held that hearsay statements were properly considered in assessing the claim for benefits and that denial of the claim was not arbitrary and capricious.

Discussion

The insurance policies in this action are herself in to the police the next day. She governed by ERISA, 29 U.S.C. Sects.1001-1461. Because it exercises authority or control in the distribution of assets of the benefits plan, Connecticut General is a fiduciary for purposes of ERISA. 29 U.S.C. Sect. 1002(21)(A). ERISA imposes duties of care, fair dealing, and impartiality on a fiduciary. See 29 U.S.C. Sect. 1104(a)(1).

Standard of Review

Denial of benefits by a fiduciary may not be disturbed under ERISA unless the decision was made arbitrarily and capriciously or in bad faith, as the decision would be if it were unsupported by substantial evidence or based on an erroneous conclusion on a question of law. Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir.1982) (citing Wardle v. Central States, Southeast & Southwest Areas, Pension Fund, 627 F.2d 820, 824 (7th Cir.1980), cert. denied, 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d 841 (1981)). The standard of review has elasticity to allow reviewing courts to account for possibilities for self-interest and other biases. This flexibility is evident in the different incantations of

the standard that look for bad faith and substantial evidence. See Van Boxel v. Journal Co. Employees' Pension Trust, 836 P.2d 1048, 1049-50 (7th Cir. 1987).

Mrs. Pierre contends that the arbitrary and capricious standard is inappropriate in this case because of the self-interest Connecticut General has in denying benefits. While Mrs. Pierre's concern is not without merit, this circuit's rule follows the weight of authority applying the arbitrary and capricious standard in ERISA cases. See Denton v. First Nat'l Bank of Waco, 765 F.2d 1295, 1303-04 (5th Cir.1985); Ganze v. Dart Industries, Inc., 741 F.2d 790, 792 (5th Cir.1984); Bayles v. Central States, Southeast and Southwest Areas Pension Fund, 602 F.2d 97, 99 (5th Cir. 1979). The standard applies equally when

the insurance carrier is the decision-making fiduciary. See Reilly v. Blue Cross & Blue Shield United of Wisconsin, 846 F.2d 416, 419 (7th Cir.), cert. denied, -- U.S.--, 109 S.Ct. 145, 102 L.Ed.2d 117 (1988). The district court correctly applied an arbitrary and capricious standard of review.

Admissibility of Hearsay

Mrs. Pierre next contends that even if the arbitrary and capricious standard of review applies in this case the use of hearsay by Connecticut General in its determination requires reversal. It is difficult to see how a plan administrator or fiduciary could base a decision on anything but extrajudicial statements. Even in formal

administrative proceedings controlled by the Administrative Procedure Act (APA) hearsay evidence is permitted. To determine whether hearsay evidence may constitute substantial evidence in support of a decision, however, the reviewing court must look to factors establishing underlying reliability and probative weight. School Bd. of Broward County v. Dept. of Health, Education & Welfare, 525 F.2d 900, 906 (5th Cir.1976) (citing Richardson v. Perales, 402 U.S. 389, 402, 91 S.Ct. 1420, 1428, 28 L.Ed.2d 842 (1971)).

Although determinations under ERISA are not controlled by the APA and the use of "hearsay" is not explicitly addressed in ERISA, the same policies of informality and practicality appear apt. The intent behind administrative procedures is to make them manageable

and comprehensible by non-lawyers while maintaining fairness. Richardson, 402 U.S. at 400-401, 91 S.Ct. at 1426-1427. The same concerns are applicable to ERISA procedures under School Bd. and Richardson, therefore, second step declarant evidence may or may not be sufficient to uphold a determination under an ERISA plan, but its consideration is not improper. See Reilly v. Blue Cross & Blue Shield United of Wisconsin, 846 F.2d at 423-24. The district court did not err in finding Connecticut General properly considered the available evidence.

The question then becomes whether the decision made by Connecticut General was arbitrary and capricious in light of all the evidence, second hand or otherwise, upon which it was based. Again, the district court properly

upheld the decision to deny benefits. Connecticut General considered all the available evidence. Mrs. Pierre does not contend that any additional evidence exists. Although the story of self-defense given by Antoinette Collins is self-serving, it is not incredible. Connecticut General based its decision to deny benefits under the accident policies on its conclusions that Miss Collins' account of the shooting was credible, that Miss Collins killed Mr. Pierre in self-defense (a version of the occurrence apparently accepted by the law enforcement authorities), and that because Mr. Pierre provoked Miss Collins' retaliation his death was not an accident. We agree with the district court that the denial of Mrs. Pierre's claim was not arbitrary and capricious or in bad faith or unsupported by

substantial evidence.

Reconsideration Hearing

Mrs. Pierre asks this court to remand this case to the administrator for consideration if the admission of hearsay evidence is upheld. Remand is appropriate in those cases where proper evidence should have been considered by the administrator but was not. See Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985). Mrs. Pierre does not assert that proper evidence has not been heard; rather, she claims that she has not been allowed to argue her claim because she failed to take advantage of a reconsideration hearing when it was available. Moreover, remand is inappropriate if reconsideration would be futile. Wolfe

v. J.C. Penney Co., 710 F.2d 388, 394 (7th Cir.1983). Reconsideration in this case would be futile. In addition, Mrs. Pierre's request for a reconsideration hearing before the plan administrator appears to be raised for the first tine on appeal; she asked the district court only to remand the case to state court.

AFFIRMED.

October 31, 1989

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CELESTINE PIERRE, ET AL * CIVIL ACTION

VERSUS * NO. 87-5554

CONNECTICUT GENERAL LIFE * SECTION"D"(1)

OPINION AND ORDER

Before the court, on Remand from the Fifth Circuit for Reconsideration is the matter of Celestine Pierre and the estate of James Nolan Pierre, Jr. v. Connecticut General Life Insurance Company of North America and Life Insurance Company of North America ("Connecticut General").

The Plaintiff, Celestine Pierre, brought suit to recover death benefits under insurance policies which

her deceased husband's employer purchased from Connecticut General as part of a welfare benefit plan. The provisions of the insurance policy permit recovery of accidental death benefits when, and only when, an insured's death results, directly and from no other causes, from bodily injuries caused by accident.

On October 26, 1986, the body of Plaintiff's husband was discovered in his car. Mr. Pierre died of gunshot wounds when Annette Collins shot him twice while the decedent allegedly beat her with his own gun. The police accepted Ms. Collins' account of the shooting and declined to prosecute her.

Based on information obtained from the death certificate, the autopsy report, an interview with the detective in the case, and a written report of a

private investigator who reviewed police records and interviewed Ms. Collins, the plan administrator concluded that Mr. Pierre's death was not an accident. Consequently, Connecticut General denied Plaintiff's claims for recovery of benefits. The court notes that almost all the evidence relied on by the plan administrator which concerned the altercation between Mr. Pierre and Ms. Collins was derived from Ms. Collins' statements to the police and to the claims investigator. The only non-hearsay evidence consisted of the detective's statement to the plan administrator that photographs of Ms. Collins revealed bruises and that the interior of Mr. Pierre's car showed signs of struggle.

Without requesting a reconsideration hearing, Plaintiff filed

suit to procure death benefits.

The majority of jurisdictions requires that the insurer bear the burden of proving that a policy exclusion applies to the claim and prevents recovery. Griffith v. Continental Cas. Co., 506 F. Supp. 1332, 1335 (N.D. Tex. 1981); Calcasieu-Marine Nat'l. Bank of Lake Charles v. American Employer's Life Ins. Co., 533 F.2d 290, 295 (5th Cir. 1976). Therefore, to deny Plaintiff's claims for benefits under the contract exclusion, Connecticut General bears the burden of proving that Mr. Pierre's death was not an accident because he was the aggressor in the altercation with Ms. Collins.

Because the policies at issue are governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. SS 1001-1461, the court initially

reviewed the denial of benefits under the well established arbitrary and capricious standard. Dennard v. Richards Group, Inc., 681 F.2d 306, 313 (5th Cir. 1982); Bayles v. Central States, Southeast & Southwest Pension Fund, 602 F.2d 97, 99-100 (5th Cir. 1979). Concluding that the hearsay evidence relied upon by the plan administrator was properly considered in assessing the claim for benefits[1], the court held that Connecticut General's

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The court noted that individuals making an administrative agency decision under the arbitrary and capricious standard, like a plan administrator's claim determination generally are not restricted by the rules of evidence. Richardson v. Perales, 402 U.S. 389 (1971); Williams v.United States Department of Transportation, 781 F.2nd 1573, 1578 (11th Cir. 1986) (hearsay is admissible and may constitute "substantial evidence"); School Board of Broward County v. Department of Health, Education & Welfare, 525 F.2nd 900 (5th Cir. 1976) (use of hearsay in administrative proceeding is proper).

decision was neither arbitrary nor capricious.

The court's decision was originally affirmed by the Fifth Circuit. 866 F.2d 141 (5th Cir. 1989). However, in light of the United States Supreme Court's recent decision in Firestone Tire & Rubber Co. v. Bruch, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2.d 80 (1989), the Fifth Circuit vacated its previous decision and remanded the cause to this court for rehearing.

DISCUSSION

The Bruch court held that under the ERISA statute where the plan instrument is silent as to the grant of discretionary power to the plan administrator to construe plan terms or to determine the eligibility of the claimant the de novo review standard, rather than the arbitrary and capricious

standard, is appropriate. Bruch, 109 S.Ct. 948 at 956. Accordingly, where neither party presented any provision in the plan instrument giving the plan administrator such discretionary authority, the Fifth Circuit applied the de novo review standard. Schultz v. Metropolitan Life Ins. Co., 872 F.2d 676, 678 (5th Cir. 1989).

Here, neither Plaintiff nor Connecticut General has presented any such provision in the plan instrument. Therefore, the de novo review standard is appropriate.

The court rejects conducting a de novo trial and instead favors the de novo review standard frequently exercised by courts evaluating the decisions of administrative agencies. "We must . . . be conscious of the

distinction between a de novo trial, where 'the case is tried a second time and the record is made up in the district court, and a court's review of findings of an administrative body, where the record is solely that of the administrative body,'" Local 777 Democratic Union Org. Comm. v. Nat'l Labor Relations Bd., 603 F.2d 862, 892 (D.C. Cir. 1978) (on petition for rehearing) (quoting Globe-Union, Inc. v. Chicago Telephone Supply Co., 103 F.2d 722, 728 (7th Cir. 1939)); National Org. for Women, Washington, D.C. Chapter v. Social Sec. Admin., 736 F.2d 727, 733 n.70 (D.C. Cir. 1984).

Reviewing de novo the findings of the plan administrator, the court discredits the hearsay evidence derived from Ms. Collins' statements as lacking in trustworthiness. At the time Ms.

Collins made her statement to the police, she did do with the possibility of exposure as a suspect in a homicide. Further, the court finds that the non-hearsay evidence is insufficient to support the plan administrator's decision to deny Plaintiff's claim. Therefore, the decision of the plan administrator is rejected, and Plaintiff is entitled to recovery of death benefits under the policy of insurance from the Defendants, Connecticut General.

IT IS ORDERED that judgment be entered in favor of Plaintiff and against Defendants as follows. Plaintiff will submit a proposed judgment to the court by Monday, the 6th day of November 1989. The court finds prejudgment interest from date of judicial demand, as prayed for by

Plaintiff, is appropriate and is awarded at rates established in 28 U.S.C. S 1961.

New Orleans, Louisiana, this 30th day of October, 1989.

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UNITED STATES DISTRICT JUDGE